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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1402

HUGH C. WILBOURN,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

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March 13, 1979

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

The petitioner, Hugh C. Wilbourn, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Louisiana entered in this proceeding on November 13, 1978.

OPINION BELOW

The petitioner herein was convicted of three counts of negligent homicide, La. R.S. 14:32, on March 31, 1977, by a jury in the Criminal District Court for the Parish of Orleans, Louisiana. A motion for a new trial was denied. Subsequently, petitioner filed a timely motion for appeal and provided assignments of errors. The Louisiana Supreme Court entered judgment affirming the conviction on November 13, 1978 and its opinion appears in 364 So.2d 995. A timely petition for rehearing was denied on December 14, 1978.

JURISDICTION

The petition for certiorari was filed within ninety (90) days of the December 14, 1978, date. The petition for rehearing was denied. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254.

QUESTIONS PRESENTED

1.) Did the search in the present case violate the 4th Amendment of the United States Constitution?

2.) Did the seizure in the present case violate the 4th Amendment of the United States Constitution?

3.) Did the New Orleans Police have any jurisdiction and/or legal right to search and seize petitioner's automobile?

4.) Did the jury selection process in this case violate petitioner's 14th Amendment rights of due process and equal protection?

STATUTORY PROVISIONS INVOLVED

The 4th Amendment of the United States Constitution.

The 6th Amendment of the United States Constitution.

The 14th Amendment of the United States Constitution.

Louisiana Code of Criminal Procedure Article 784.

STATEMENT OF FACTS

On September 21, 1975, three men were *killed* in an alleged hit-and-run incident on the *Bayou Bievenue bridge*. The petitioner, Hugh C. Wilbourn, was arrested and charged with the offenses.

On Monday, September 22, 1975, at about 4:15 P.M., St. Bernard Parish Deputies, B. Emmons and L. Gagliano were on routine vehicular patrol when they received radio dispatch to proceed to 513 Norton Avenue, Arabi, Louisiana and check for a brown late model Ford suspected of being involved in a hit and run. The source of this information was an anonymous telephone call received by the radio dispatcher.

At approximately 4:30 P.M., Deputies Emmons and Gagliano arrived by vehicle and stopped at the premises located at 513 Norton Avenue. Upon arriving, the officers observed a two-tone (white top, brown bottom) 1974 Ford parked under the carport. The right rear tire of the vehicle in the carport was flat, and its right rear bumper appeared to be damaged. The car was parked with its rear facing Norton Avenue. (See defense exhibits D-3 and D-4). The car and carport appeared to be empty.

The officers then entered the carport in order to obtain a view of the front of the vehicle in an effort to determine if the vehicle had in fact been involved in a hit and run. Once in the carport, the officers walked to the front of the vehicle and observed what appeared to be blood stains and *damage on* the front of the car. The front of the vehicle *could not* be seen from either the street or sidewalk.

Thereafter, the vehicle was impounded, without a search warrant, determined to be owned by defendant, Hugh C. Wilbourn. It was also determined that the defendant resided at 513 Norton Avenue.

Prior to entering the premises of 513 Norton Avenue, the police had neither an arrest warrant nor a search warrant. (MTS tr. pp. 12, 13 and 27). Evidence taken from the exterior of the car, and submitted to scientific analysis, was used at the trial of petitioner herein and was relied upon exclusively in order to prove his guilt.

REASONS FOR GRANTING THE WRIT

1.) The search conducted herein violated the Fourth Amendment to the U.S. Constitution.

It is now well settled under the Fourth Amendment to the United States Constitution that a search conducted without a warrant issued upon probable cause is per se unreasonable subject only to a few specifically established and well delineated exceptions, to-wit: searches made incident to a lawful arrest, so-called "plain-view" searches, made when an officer is where he has a right to be, consent searches, and searches made under exigent circumstances or in close pursuit. *Vale v. Louisiana*, 90 S.Ct. 1969, 399 U.S. 30 (1970). Because the instant search and seizure was nonconsensual (MTS tr. pp. 7, 8 and 27), was *not* made pursuant to a lawful arrest (MTS tr. pp. 14 and 15), and, in fact, involved no form of "close pursuit" (MTS tr. 18 and 27), the issue before this Honorable Court is whether the search can be upheld due to the existence of exigent circumstances or under the "plain-view" doctrine.

It should be noted initially that the specific issue before this Court is whether the police had the right to be where they were when they observed the alleged evidence on the *exterior* of the car. This is to say that because the front exterior of the vehicle could *not* be seen from the street or outside the boundaries of 513

Norton (MTS tr. pp. 8, 9 and 26; def. exh. D-3 and D-4), the officers must have had the right to enter the carport and place themselves in front of the vehicle *prior* to viewing the evidence.

With respect to the officers' right to enter the carport without a warrant, the first question that must be discussed is that of the application of Fourth Amendment protection to an area adjacent to a house. It is, of course, well settled that it is an individual's right to privacy, not a specific place, which is protected by the Fourth Amendment. *Katz v. United States,* 88 S.Ct. 507, 389 U.S. 347 (1967). The central question to be asked is: What was the defendant's expectation of privacy? The facts in the instant case demonstrate that the position of the carport and car were such that anyone so parking the car could reasonably expect the carport to be free from police intrusions.

The car and carport in question were clearly on the premises of 513 Norton. (MTS tr. pp. 12 and 31) An examination of defense exhibits D-3 and D-4 demonstrates that the carport was recessed such that the front boundary of the carport was farther from the street than was the front of the house. Moreover, the carport was fully connected to the house on one side and enclosed by a cement fence on the other. The car itself was parked such that its front bumpers were as close to the back wall of the carport as possible thus positioning the vehicle completely within the confines of the carport.

It should be noted that the carport was used only by the residents of 513 Norton and was not part of an apartment complex. Furthermore, it was not necessary to walk through the carport in order to enter the front door of the residence. (See def. exhibit D-2). This is to say that the carport was *not* used as a passageway for entrance to the house itself. The Louisiana State Supreme Court erroneously held as a matter of fact that the side door was an entranceway into the house. In point of fact, this side door opened into a utility shed, and, as such, was not used, nor intended to be used by the members of the public.

Additionally, the evidence found on the exterior of the car was positioned so that it could not be seen by one merely walking to the front door of the house; rather, the evidence was on the right *front* of the vehicle and could only be seen by standing between the car and the rear of the carport. (Tr. p. 12, see def. exhibits D-3 and D-4). Clearly, if a lay person entered *any part* of the carport without permission, much less the area at the rear of the carport, possible charges of attempted burglary, criminal mischief, etc. would lie. Under these circumstances, there should be no question but that the protections of the Fourth Amendment to the United States Constitution applied to the car parked in the carport at 513 Norton Avenue. The next issue, therefore, is whether exigent circumstances existed so as to justify the officers' warrantless entrance into the constitutionally protected area.

In *Carroll v. United States*, 45 S.Ct. 280, 267 U.S. 132 (1925), this Honorable Court established a more relaxed warrant requirement for vehicles than for homes or buildings as the former, due to their mobility, can be quickly moved out of the jurisdiction or locality where the warrant is sought. The Court felt that if a police officer has probable or reasonable cause to believe that a vehicle contains contraband, he should not be required to obtain a search warrant if to do so would risk the loss of the evidence. This risk of loss, i.e., exigent circumstances, negates the need for a warrant.

However, the Court made it clear in *Coolidge v. New Hampshire*, 91 S.Ct. 2022, 403 U.S. 443 (1971), that the mere fact that an automobile is the object of a search does not mean that a search warrant will never be required. In *Coolidge*, the police had known for some time of the probable role of the car in the crime, and the defendant had had ample opportunity to destroy any evidence that might have been in the car. Furthermore, the defendant in *Coolidge* had no access to the vehicle at the time of his arrest, and the objects sought by the police were neither stolen, contraband, nor dangerous. The Court ruled that under those circumstances, the police were required to obtain a search warrant before searching the vehicle as no exigent circumstances existed that would negate the need for a warrant.

Factors to be considered regarding the existence of exigent circumstances are a suspect's access to the vehicle, the extent and practicality of policy observa-

tion of the car, and the length of time prior to the search in which the officers had to secure a warrant. See *Coolidge, supra*. An examination of the case at bar demonstrates that no exigent circumstances existed so as to justify a warrantless search.

When the police first arrived at 513 Norton, they observed that the car in the carport did *not* exactly fit the description given by the informant; that is, the informant had described the vehicle as being merely brown, whereas the car in the carport was brown and white. (MTS tr. pp. 7 and 24). As a result of this discrepancy, the police officers neither suspected the car's involvement in the offense nor knew that the car was in fact the one described by the informant. (MTS tr. pp. 8, 9 and 28). Moreover, *prior* to entering the premises, the officers observed that the vehicle had one flat tire and that no one was in the vicinity of the car. (MTS tr. pp. 7, 14, 26 and 17) When these facts are coupled with the fact that the police were not looking for contraband that could be easily hidden or destroyed (MTS tr. pp. 18 and 27), it becomes readily apparent that no exigent circumstances existed so as to negate the need for a warrant. This is to say that because the officers lacked probable cause to believe that the vehicle was the one involved in the crime, the vehicle could not be readily moved, and there was no imminent danger of the vehicle or evidence being tampered with or destroyed the police were under a constitutional obligation to obtain a search warrant. The defense submits that under the instant facts, this constitutional requirement would have

imposed absolutely no burden on the police as the premises could have easily been placed under surveillance while a warrant was obtained. The question then becomes whether the instant search was justified by the plain-view doctrine.

Under the plain-view doctrine, an officer can seize incriminating evidence which he observes in plain-view if he has a right to be where he is when he observes the evidence. But the Court has consistently held that in order for an officer to seize an object in plain-view, that object must be *clearly* contraband or evidence. Moreover, the jurisprudence is clear that planned warrantless searches can never be validated on plain-view grounds. *Coolidge v. New Hampshire,* 91 S.Ct. 2022; 403 U.S. 443 (1971).

When the officers in the instant case arrived at 513 Norton, they saw the vehicle in question parked in the carport but, as was previously stated, they did not believe this car to be the one referred to in the tip. (MTS tr. pp. 8, 9 and 28). In fact, it was not until *after* they had entered the carport and observed the front of the car that they suspected that it had been involved in a hit and run. Thus, *prior* to the officers' entering of the carport, the car was *not* clearly contraband, with the result that the officers did not have the right to enter the property and seize the car and evidence based only on their observations from the street. The final matter that needs to be discussed, therefore, is the possibility that the officers' search of the carport can be justified solely on the basis of the anonymous tip.

This Court has been called upon on many occasions to rule on searches made pursuant to information provided by either confidential or anonymous informants. See *Adams v. Williams,* 92 S.Ct. 1921, 407 U.S. 143 (1972); *Spinelli v. U.S.,* 89 S.Ct. 584, 393 U.S. 410 (1969); *Aguillar v. Texas,* 84 S.Ct. 1509, 378 U.S. 108 (1964); *Draper v. United States,* 79 S.Ct. 329, 358 U.S. 307 (1959). In each case, the central question was the degree of reliability of the information.

In *Adams, supra,* a police officer was told by a *reliable* informant that an individual seated in a nearby car was carrying narcotics and had a gun at his waist. When the officer approached the suspect, the individual acted suspiciously, so the officer reached for and found the hidden gun. In upholding the search and seizure, the Court stated:

> "(W)e believe that Sergeant Connolly acted justifiably in responding to the informant's tip. The informant was known to him personally and had provided him with information in the past. This is a stronger case than obtains in the case of an anonymous telephone tip. The informant here came forward personally to give information that was immediately verifiable at the scene." *Adams, supra.* S.Ct. 1923, U.S. 146.

In *Spinelli, supra,* the Court was faced with the question of the validity of a search warrant that was based

in large part on information provided by a "confidential" reliable informant. The affidavit in *Spinelli*, however, failed to specify why the informant had received his information. The Supreme Court, in reversing the conviction, noted that "in the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip described the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." *Spinelli, supra*, at S.Ct. 589, U.S. 416.

In *Draper, supra*, the Court upheld a search that was based on information that was supplied by an informant and that was verified by police observation. In *Draper*, a "special employee" of the Bureau of Narcotics had provided Agent Marsh with accurate and reliable information for about six months. He informed Marsh that one Draper would be arriving in Denver by train on a given date and that he would be carrying three ounces of heroin. He further gave Marsh a detailed physical description of Draper and the clothes he would be wearing and said that Draper habitually walked real fast. Upon placing the train station under surveillance, the police observed an individual fitting the exact description and having all of the physical characteristics of the suspect described by the informant. Accordingly, the police stopped and arrested Draper. In upholding the arrest, the Supreme Court found particularly persuasive the facts that the informant had been reliable in the past and that the information leading up to the arrest was verified by the police.

It should be clear that in the case now before this Court, the officers had absolutely no reason to believe that the information was reliable, and they made no attempt to verify the tip *prior* to conducting the search. As was previously stated, the information that lead the police to 513 Norton was provided by an *anonymous* informant, with the result that the officers did not know whether or not the informant had ever provided information, reliable or unreliable, in the past. Moreover, the information provided, that is, that a brown Ford was parked in the carport at 513 Norton, was not entirely correct as the car was in fact brown and white. This discrepancy confused the officers as to whether the car was the one referred to in the tip. (MTS tr. pp. 8 and 28). Finally, the tip did not specify what the hit and run vehicle had allegedly been involved in and did not indicate how the informant had come upon the information. (MTS tr. pp. 5, 17 and 24). Thus, under the principle enunciated by the Court, the instant tip did not constitute sufficient probable cause to justify a search of the premises at 513 Norton.

The petitioner submits that for the reasons discussed above, the search and seizure now before this Honorable Court violated the defendant-appellant's rights under the Constitution of the United States to be free from unreasonable searches. As such, all

evidence obtained as a result of the seizure must be excluded at trial. *Mapp v. Ohio*, 81 S.Ct. 1684, 367 U.S. 643 (1961). Because the vehicle and evidence here in question served to link the defendant to the crime charged, the Trial Court's error in denying the Motion to Suppress Evidence can in no conceivable way be deemed harmless. For these reasons, the petitioner respectfully urges this Honorable Court to issue a Writ of Certiorari to the Louisiana State Supreme Court reversing his conviction and/or suppressing any and all evidence obtained from the instant search.

2.) The seizure of the petitioner's automobile violated the 4th Amendment of the United States Constitution.

Several hours after the St. Bernard police officers first saw the petitioner's automobile in the carport, the vehicle was seized by New Orleans officers and removed to the New Orleans police laboratory, still without the officers having obtained a warrant and/or judicial authority to do so. This warrantless seizure, according to the Louisiana State Supreme Court, was justified by exigent circumstances. These circumstances consist of a hurricane alert at the time, instanced by overcast skies, and the testimony of the officer in charge that, should the hurricane strike, the evidence on the exterior of the automobile might be damaged or obliterated by the rain, even though covered by plastic and even though the vehicle was in a carport.

The most obvious fallacy with this reasoning is that the New Orleans police officers had several hours *before* the questioned seizure to obtain a search warrant. Certainly, the "exigent circumstances" existed during this period of time, yet, the officers failed to obtain the requisite warrant. See *Taylor v. U.S.*, 286 U.S. 1, 76 L.Ed. 951, 52 S.Ct. 466 and *Coolidge v. U.S., supra.*

More important, the imminent hurricane, relied on to complete the "exigent circumstances," should have convinced the prudent police to keep the car in the protection of the carport and obtain a warrant for its seizure. (See Justice Dixon's dissentiry opinion, *State v. Wilbourn, supra,* et 997.)

The petitioner submits that the warrantless seizure herein was unjustifiable and illegal. The police claim that it was necessary to seize the automobile from an enclosed, protected area and move it into the very face of the impending storm is both illogical and unreasonable. The explanation for the seizure and the seizure itself violates petitioner's Fourth Amendment right to be secure against unreasonable search and seizures.

3.) The New Orleans police lacked jurisdiction and/or legal right to search and seize the petitioner's automobile.

The petitioner's automobile, when first sighted by law enforcement officials, was parked in Arabi, Loui-

siana, St. Bernard Parish. After the initial search of the vehicle by St. Bernard Parish officials, the petitioner's automobile was seized by New Orleans Police Officers, and transported over parish lines without judicial warrant and/or legal authority. In the New Orleans Police Department Crime Laboratory the exterior of the car was scientifically examined. Petitioner respectfully submits that the results of these scientific examinations were illegally obtained and should be suppressed, as the New Orleans Police Department had no authority to seize the car and transport it across parish (i.e. county) lines.

The automobile in question was clearly outside of the jurisdiction of the New Orleans Police. It was parked in St. Bernard Parish. There is no question of "hot pursuit."

The New Orleans Police have no jurisdiction in St. Bernard Parish nor do the St. Bernard Parish police have any authority to release an automobile parked in St. Bernard Parish and belonging to a St. Bernard Parish citizen, to the police from another authority without judicial authority.

4.) The jury selection process violated the due process and equal protection clauses of the 6th and the 14th Amendments of the United States Constitution.

The Louisiana Code of Criminal Procedure Article 784, entitled "Method of Selecting Panel", provides:

> "In selection a panel, names *shall* be drawn from the petit jury venire indiscriminately and by lot in open court and in a manner to be determined by the court." (emphasis added)

There is no doubt that the trial court in this case failed to select the petit jurors by lot in open court as required by La. Code of Criminal Procedure Article 784. Instead, the order of calling the petit jurors venire had allegedly been determined by lot, but this was in the jury pool room instead of in open court.

The Louisiana State Supreme Court, in *State v. Hoffman*, 345 So.2d 1 (LA. 1977) held that while this procedure was invalid it would only apply this ruling to jury panels selected after the finality of the decision of the court in *Hoffman*. (See *State v. Wilbourn, supra*, at 997).

The petitioner respectfully submits that this prospective application of La. Code of Criminal Procedure Article 784, violates the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. A chronological sequence of the two cases, i.e. *Hoffman* and *Wilbourn*, demonstrates the violation.

The instant case was tried, and timely objection was made, to the petit juror venire by the petitioner, on March 31, 1977. Petitioner's written motion for appeal was filed on April 7, 1977. The final decision in *Hoffmann* was handed down on April 26, 1977. Petitioner submits

that, at the very least, his motion for appeal was submitted to the Louisiana Supreme Court before its decision in *Hoffmann*. (See *State v. Gibbs*, 355 So.2d 1299 at 1302 (La. 1978). Accordingly, his case is one in which the application of the law should be made.

Most importantly, the Louisiana State Supreme Court in *Hoffmann* found that the trial court's failure to select a jury panel as mandated by Louisiana Code of Criminal Procedure, Article 784 was a serious defect and constituted reversible error.

The same considerations that prompted the State Supreme Court to make such a ruling apply to the instant case with equal force. Further, while the instant case preceded the *Hoffmann* decision by only one month, it is nevertheless entirely possible that this brief could have been timely submitted for appellate review had there been no delays on the part of the trial court reporter of Section "I" of the Criminal District Court for the Parish of Orleans, in transcribing the trial and hearings and if counsel had realized that time was of the essence for filing the brief. Accordingly, to limit the application of *Hoffman* so as to exclude those cases in which a motion for appeal had been filed *prior to Hoffman and* in which timely objection to the jury selection had been made at the trial, would be to violate all Notions of fundamental fairness and due process of law.

The petitioner submits that he was denied his rights to due process of law and a fair trial when the jury for his trial was selected in violation of C.Cr. P. Article 784.

Moreover, petitioner submits that he was denied equal protection of the laws when the application of the Louisiana State Supreme Court's decision which would reverse his conviction is applied prospectively only. Petitioner had filed his motion weeks before such a decision. The error in his case was just as defective as the error in the *Hoffman* case. For this reason, petitioner respectfully urges this Honorable Court to issue a writ of certiorari to the Supreme Court of the State of Louisiana.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Louisiana Supreme Court in *State v. Wilbourn*, reported in proceedings No. 62,005 of the Supreme Court of Louisiana.

Respectfully submitted,

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CERTIFICATE

I hereby certify that three copies of the above and foregoing have been served on Hon. Harry Connick, District Attorney and Dennis Waldron, Criminal Courts Building, 2700 Tulane Avenue, New Orleans, Louisiana 70119, by U.S. Mail, postage prepaid, this ____ day of March, 1979.

BRUCE C. ASHLEY, II

APPENDIX

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA,
Appellee

versus No. 62,005

HUGH C. WILBOURN,
Appellant.

Dated: Nov. 13, 1978

Appeal from the Criminal District Court, Orleans Parish; Honorable Israel M. Augustine, Jr., District Judge, Presiding.

TATE, Justice.

The defendant was convicted of three counts of negligent homicide, La. R.S. 14:32, and sentenced to five years imprisonment on each count, the sentences to run concurrently. The defendant's appeal relies upon two assignments of error.

Assignment of Error No. 1 presents a substantial issue. It concerns the denial of a motion to suppress certain evidence obtained as the result of a warrantless and allegedly unconstitutional search and seizure.

Context Facts

The accused is charged with the deaths of three persons injured by a hit and run motorist on September 21. On the following day at about 4:15 p.m., the police received an anonymous telephone tip that a brown Ford believed to be involved in a hit and run accident on Paris Road was located in a carport in the vicinity of Norton Street at Paris Road.

The dispatcher radioed to two police officers who were cruising in the vicinity. They saw a brown Ford with a white top parked in a carport at 513 Norton Street. Only the rear of the car was fully visible from the street.

The officers entered the carport to look at the car. When they came to its front, they saw blood and particles of hair on the right font. They radioed their findings, and other officers came and took pictures, then taped a covering on the front of the vehicle.

The automobile belonged to the defendant, who was a tenant at 513 Norton Street. Subsequently, the owner of the premises came home and identified the accused as the vehicle's owner. Neither the accused nor the home owner authorized the search of the vehicle, nor its subsequent impounding (when it was removed to a police laboratory).

The police officer's entry in the carport to look at the front of the vehicle was admittedly made without a

warrant, as was the subsequent removal of the vehicle to the police laboratory.

Legal Issue

The ultimate issue is whether the police officers' entry into the carport to look at the vehicle violated any reasonable expectation of privacy on the accused's part that is constitutionally protected. State v. Lamartiniere, ____ So.2d ____ (docket no. 61,621); State v. Fearn, 345 So.2d 468 (La. 1977); State v. Nine, 315 So.2d 667 (La. 1975). These decisions indicate that the test is not only whether the person had an actual (subjective) expectation of privacy, but also whether the defendant's expectation of privacy is of a type which society at large is prepared to recognize as being reasonable.

Our resolution of this issue is not free from doubt. Under some circumstances, and with the physical layout of some carports, the individual's reasonable expectation of privacy might be violated by an unauthorized entry into a carport to look at its contents.

However, it is a particular individual's right to privacy, not a particular place, which is protected by the constitution. Thus, it is appropriate to take into consideration the particular facts and circumstances, the total atmosphere of the case, in determining whether the constitutional right to privacy has been violated by an unauthorized entry into a part of the premises

which is open to the public. State v. Nine, cited above, at 315 So.2d 671.

Under the particular circumstances of this case, we do not find that either the accused's subjective expectation of privacy, or else what society would consider a reasonable expectation of privacy, were offended by the police officers' entry into the unenclosed carport to look at the front of the vehicle, which had been reported (although by a tip of unverified reliability) as having been involved in a hit and run accident the day before. The carport was on the side of the house, not enclosed from the street, and only partially enclosed on one side:

Persons entering the side-door of the house, or those knocking at the side-door to find out if someone was home or to deliver or sell something, could readily view the front of the vehicle parked alongside. That sort of entry into this carport by members of the public (including police officers on an investigatory mission) is deemed to have been reasonably within the contemplation of the accused, when he left property in the semi-public premise available for public view.

We therefore find no unconstitutional invasion of the accused's right to privacy resulted when the police officers entered this particular carport to look at the vehicle, and no unconstitutional taint in their recording the information they observed there.

Nevertheless, a further troublesome issue is raised by the accused. A couple of hours after the first visit,

the vehicle was seized by officers and removed to the police laboratory, still without the officers having obtained a warrant and judicial authority to do so. The accused contends, with considerable force, that, at least, the results of the laboratory testing consequent to this warrantless seizure should be suppressed.

The laboratory testing was limited to findings based on an examination of the exterior of the vehicle. Cf. Cardwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464 (1978). We are not faced with a warrantless search of the interior or trunk of the car, following a warrantless seizure. If we were, our conclusion might well be different than the following:

With some reservations, we finally conclude that the trial court did not err in finding that the warrantless seizure was justified by exigent circumstances, insofar as it was immediately necessary to protect evidence on the vehicle's exterior. The circumstances consist of the hurricane alert at the time, instanced by overcast skies, and the testimony of the officer in charge of the substantial possibility that, should the hurricane strike, the evidence of blood and hairs on the automobile might be damaged or obliterated by rain, even though covered by plastic and even though the vehicle was in a carport (which, however, was open at the side and to its rear).

Conclusion .

The other assignment of error concerns the failure to select the petit jurors by lot in open court as required by La.C.Cr.P. art. 784. See State v. Hoffman, 345 So.2d 1 (La. 1977). Here, the order of calling the petit juror venire had indeed been determined by lot, but in the jury pool room instead of in open court.

The present case was tried before *Hoffman* had held to be invalid the latter procedure utilized by the Criminal District Court of Orleans Parish. However, *Hoffman* specifically limited the effect of its ruling to jury panels selected after the finality of the decision of the court in that case.

Accordingly, for the reasons assigned, we affirm the convictions and sentences.

AFFIRMED.

/s/ FAB
/s/ FWS
/s/ AT, Jr.
/s/ PFC
/s/ WFM
/s/ JLD

DIXON J., dissents with reasons.

SUPREME COURT OF LOUISIANA

No. 62005

STATE OF LOUISIANA

versus

HUGH C. WILBOURN

DIXON, Justice (dissenting)

I respectfully dissent.

True, there was no expectation of privacy, and the initial intrusion into the carport was not illegal. But no adequate reason is suggested to justify the failure of the police to obtain a warrant for the seizure of the car. The imminent hurricane, relied on to complete the "exigent circumstances," should have convinced prudent police to keep the car in the protection of the carport and obtain a warrant for its seizure.

SUPREME COURT OF LOUISIANA

NO. 62005

STATE OF LOUISIANA

VERSUS

HUGH C. WILBOURN

APPEAL FROM THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, STATE OF LOUISIANA, SECTION "I", NO. 253-070, THE HONORABLE ISRAEL M. AUGUSTINE, JR., JUDGE PRESIDING

APPLICATION FOR RE-HEARING
ON BEHALF OF HUGH C. WILBOURN,
DEFENDANT-APPELLANT

Submitted By:

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[1] *STATEMENT OF JURISDICTION*

The defendant-appellant, Hugh C. Wilbourn, was charged with and convicted of three (3) counts of violating L.R.S. 14:32, relative to the offense of negligent homicide. He was sentenced to serve five (5) years in the custody of the Louisiana Department of Corrections, with credit for time served, on each of the three (3) counts, the sentences to run concurrently. On November 13, 1978, this Honorable Court affirmed the defendant's conviction. This Honorable Court has appellate jurisdiction over this cause by virtue of Rule 9 of the Louisiana Supreme Court Rules.

STATEMENT OF THE CASE

On September 21, 1975, three men were killed in an alleged hit-and-run incident on the Bayou Bienvenue Bridge. The defendant-appellant, Hugh C. Wilbourn, was arrested and charged with the offenses.

On January 13, 1976, the Orleans Parish Grand Jury returned a true bill of indictment charging the defendant-appellant with three counts of negligent homicide. Trial was held on March 31, 1977, at which time, the defendant was found to be guilty as charged on all three counts.

On April 5, 1977, the defendant filed a Motion for New Trial which was denied, and was sentenced to serve five years in the custody of the Department of Corrections on each count, with credit for time served. The sentences were to run concurrently.

Of the objections noted at trial, only two have been assigned as error for the purposes of appellate review. The first error deals with the Trial Court's denial of counsel's Motion to Suppress Evidence following the hearing held on such Motion on January 4, 1977. Defense counsel applied for remedial writs attacking the denial of the Motion to Suppress, but said application was denied. The second error now submitted for review concerns the jury selection procedure used at trial.

This matter came before this Honorable Court on October 12, 1978 for oral argument. On November 13, 1978, this Court, in an opinion authored by Justice Tate, affirmed defendant's conviction by a vote of six to one, with a singular dissent by Justice Dixon.

[2] *SYLLABUS*

A search conducted without a warrant issued upon probable cause is per se unreasonable subject only to a few specifically established and well delineated exceptions.

SPECIFICATION OF ERROR

The trial court erred when it denied defense counsel's Motion to Suppress Evidence.

ARGUMENT

In this Honorable Court's original decision, it made the factual determination that the protection afforded by the Fourth Amendment to the United States Constitution did not apply in this particular case.

This Honorable Court based its findings on the following findings of fact:

1) ". . . the carport was on the side of the house, not enclosed from the street, and only partially enclosed on one side." (Supreme Court Opinion p. 3; App. p 4a)

2) "Persons entering the side-door of the house, or those knocking at the side-door to find out if someone was home or to deliver or sell something, could readily view the front of the vehicle parked alongside. That sort of entry into this carport by members of the public (including police officers on an investigatory mission) is deemed to have been reasonably within the contemplation of the accused, when he left property in the semi-public premise available for public view." (Supreme Court Opinion p 3; App. p 4a)

The defendant respectfully avers that this Honorable Court misconstrued the physical lay-out of the carport in question for the following reasons:

1) The "side-door" was actually in front of the automobile, recessed at the farthest point of the carport.

2) The door was not an entranceway into the house, but only into the utility shed, and as such, was not used by members of the public.

[3] *CONCLUSION*

The defendant respectfully requests that this Honorable Court reconsider its opinion of November 13, 1978 in which it affirmed defendant's conviction because it made an erroneous finding of fact relative to the "side-door" and the defendant's expectation of privacy within the area in question.

[4] *CERTIFICATION*

I hereby certify that the foregoing Application for Re-Hearing on behalf of Defendant-Appellant has been duly served on Appellee by placing two copies of same in the United States mail, postage prepaid, properly addressed to Mr. Dennis Waldron, Assistant District Attorney, Criminal Courts Building, 2700 Tulane Avenue, New Orleans, Louisiana, 70119.

Arabi, Louisiana, this 27th day of November, 1978.

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